SHOW } PROCEEDINGS AND ORDERS DATE: 032985

ASE NBR 84-1-00018 AFX
HORT TITLE Talamini, Florence DOCKETED: Jan 24 1984
VERSUS Allstate Ins. Co. TIME QUESTION

Date	Proceedings and Orders
Jan 24 1984	Statement as to jurisdiction filed.
Mar 30 1984	Motion to direct the Clerk to file the jurisdictional statement which does not comply with the Rules of the
Apr 16 1984	Court and order denying same by the Court on April 16, 1984.
Aug 6 1984	Motion of appellee Allstate Insurance Company to dismiss or affirm filed.
Aug 8 1984	DISTRIBUTED. September 24, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	REDISTRIBUTED. November 21, 1984
Nov 26 1984	REDISTRIBUTED. November 30, 1984
Dec 10 1984	REDISTRIBUTED. January 4, 1985
Dec 10 1984	Brief of appellant Florence Talamini in response to request
Dec 10 1984	*Response filed in typewritten form.
Jan 7 1985	REDISTRIBUTED. January 11, 1985
Jan 14 1985	REDISTRIBUTED. January 18, 1985
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	Appeal DISMISSED for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari DENIED. Separate opinion by The Chief Justice, with whom Justice Rehnquist and Justice O'Connor join. Concurring opinion by Justice Stevens, with whom Justice Brennan, Justice Marshall and Justice Blackmun, join. Justice White, believing that

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 032985

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****

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84-18

Office-Supreme Court, U.S.
FILED
JAN 24 1984
ALEXANDER L. STEVAS,
CLERK

NO:

IN THE SUPREME COURT OF THE
UNITED STATES

TERM,

TALAMINI, Florence, Administratrix of the Estate of John A. Talamini, Deceased
Appellant

VS

ALLSTATE INSURANCE COMPANY
Appellee

APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD
CIRCUIT

JURISDICTIONAL STATEMENT

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132 pp

QUESTIONS PRESENTED

A. Whether the U.S. Court of Appeals for the Third Circuit committed error by dismissing Plaintiff/Appellant's Appeal on the grounds that it lacked jurisdiction to hear the Appeal?

B. Whether Plaintiff/Appellant has been denied due process of law as to Count II of her Complaint by virtue of the cumulative effect of the U.S. District Court for the Eastern District of Pennsylvania's dismissal of Count II and the Court of Appeals' dismissal of her Appeal?

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NO:

IN THE SUPREME COURT OF THE
UNITED STATES

TERM,

TALAMINI, Florence, Administratrix of the Estate of John A. Talamini, Deceased	:
Appellant	:
VS	:
ALLSTATE INSURANCE COMPANY	:
Appellee	

I. Statement of Jurisdiction

This Appeal is taken pursuant to 28 U.S.C.A. §1254 from the denial of an appeal by the United States Court of Appeals for the Third Circuit on October 24, 1983, of an action in assumpsit which was originally removed to the United States District Court for the Eastern District of Pennsylvania under 28

U.S.C.A. §1441, whose jurisdiction was based on the diversity of citizenship of the parties under 28 U.S.C.A. §1332. Notice of Appeal to the Supreme Court of the United States was filed by Appellant on January 23, 1984, with the U.S. Court of Appeals for the Third Circuit.

II. Statement of the Case

Florence Talamini, ("Talamini") as Administratrix of the Estate of John A. Talamini, Deceased ("Decedent"), brought an action in assumpsit on behalf of the Estate of John A. Talamini. On or about December 10, 1981, Talamini's decedent was a passenger in an automobile owned by Joseph F. Pelligrino ("Pelligrino") which was involved in an automobile accident. Allstate insured Pelligrino's vehicle, with Joseph F. Pelligrino as the named insured. As a direct and proximate result of the accident, Talamini's decedent was injured and required medical attention and treatment. John A. Talamini subsequently died. As a direct and proximate result of the accident and his subsequent death, Talamini's decedent lost the wages of his employment. In

addition, Talamini, as wife of the decedent and as a direct and proximate result of the accident, lost the income of the decedent, which would have been contributed to her if the decedent had not sustained fatal injuries, and, consequently, claimed entitlement to survivor's loss benefits. In addition, Talamini incurred reasonable expenses directly related to the decedent's funeral and burial.

Pursuant to the Pennsylvania No-Fault Motor Vehicle Insurance Act ("No-Fault Act"), 40 Pa. C.S.A §1009 et seq., Talamini sought coverage and payment of No-Fault benefits from Allstate. A copy of the Act is attached hereto and is contained in Appellant's Appendix at p. A17. Under the No-Fault Act, Allstate was obliged to provide

coverage and payment of No-Fault benefits to Talamini. On April 11, 1983, Talamini submitted a claim for No-Fault benefits. Allstate did not communicate a decision to Talamini on her claim. Thereupon, Talamini instituted an action in the Philadelphia County Court of Common Pleas to recover the benefits due her under the No-Fault Act (Count I of Talamini's Complaint) and, in addition, pleaded a right to recover under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count II of Talamini's Complaint). (Hereinafter referred to as "the Law"). 73 Pa. C.S.A. §201-1 et seq. A copy of the Law is attached hereto and is contained in Appellant's Appendix at p. A89. Talamini claimed in Count II of her Complaint that Allstate had violated the Law in two respects: (1) that

Allstate had engaged in unfair methods of competition and/or unfair or deceptive acts or practices in the conduct of any trade or commerce in violation of §201-3 of the Law; and (2) that Allstate had engaged in fraudulent conduct which had created a likelihood of confusion or of misunderstanding in violation of §201-2(XVii) of the Law, supra. Talamini cited as her basis for the aforesaid violations, Allstate's continued denial of payment of No-Fault benefits due to her as well as Allstate's failure to settle her claim in a prompt, fair and equitable fashion. Allstate subsequently removed the case to the United States District Court for the Eastern District of Pennsylvania, alleging diversity of citizenship as the basis for the District Court's jurisdiction over the subject

matter of the action. 28 U.S.C.A. §1332. See Appellant's Appendix at p. A15.

Subsequently, Allstate filed a Motion to Dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure [28 U.S.C.A. Rule 12 (b)(6)] as to Ccunt II of Talamini's Complaint in Assumpsit with the District Court, wherein a claim for relief under the Consumer Protection Law, supra, was contained. On August 15, 1983, said Motion was granted. See Appellant's Appendix at p. A3.

On August 18, 1983, Plaintiff/ Appellant filed a Notice of Appeal with the District Court. Thereafter, on October 4, 1983, Appellee filed a Motion to Dismiss Plaintiff/ Appellant's Appeal with the U.S. Court of Appeals for the Third Circuit. Appellant's Brief and Response to

Appellee's Motion to Dismiss was subsequently filed on October 11, 1983. On October 24, 1983, the Court of Appeals dismissed Plaintiff/Appellant's Appeal on the ground that it lacked jurisdiction to hear the appeal. A copy of the Court of Appeals' Order is attached hereto and is contained in Appellant's Appendix at p. A1. Subsequently, Appellant filed a Notice of Appeal on January 23, 1984 with the U.S. Court of Appeals for the Third Circuit.

III. Need for Plenary Consideration

Plaintiff/Appellant now appeals the decision of the Court of Appeals under 28 U.S.C.A §1254 (See Appellant's Appendix at p. A12) on the grounds that: (1) the Court of Appeals erred in dismissing Plaintiff/Appellant's Appeal and (2) Appellant has been denied due process of law under the 5th Amendment to the United States Constitution as a result of the District Court's dismissal of Count II of her Complaint and the Court of Appeals' dismissal of her Appeal. The 5th Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S.C.A. Constitution, Amendment V.

Appellant has been denied her right to due process of law by virtue of the fact that she has been deprived of her opportunity to be heard as to Count II of her Complaint "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d. 18 (1976).

In dismissing Appellant's Appeal, it is presumed that the Court of Appeals relied on Appellee's argument that the decision of the District Court was not sufficiently final to warrant the Court of Appeals' assertion of subject matter jurisdiction over this matter. The

Pennsylvania Supreme Court, in Bell v. Beneficial Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975), relying on the United States Supreme Court's holding in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1226, 93 L.Ed. 1528 (1949) held that:

> Whether an order is final and appealable cannot necessarily be ascertained from the face of a decree alone, nor simply from the technical effect of the adjudication. The finality of an order is a judicial conclusion which can be reached only after an examination of its ramifications. We follow the reasoning of the United States Supreme Court that a finding of finality must be the result of a practical rather than a technical construction. Cohen, supra. (Emphasis added).

Therefore, the test is whether the order in its "practical aspect" is sufficiently final to be appealable. Bell, supra. If the practical consequence of the order by the trial court is effectively to put an

appellant "out of court" the order will be treated as final. Ventura v. Skylark Motel, Inc., 431 Pa. 459, 463, 246 A.2d 353, 355 (1968). Similarly, an order is "final" if it precludes a party from presenting the merits of his claim to the lower court. Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978); Marino Estate, 440 Pa. 492, 494, 269 A.2d 645, 646 (1970).

In R.B. Equipment Company v. Williams, Shields, Snyder and Gous, 304 Pa. Super. 31, 450 A.2d 85 (1982), Judge Montemuro, in a strong dissenting opinion stated the following:

> In Commonwealth v. Osatti, 448 Pa. 72, 74-75, 292 A.2d 313, 315 (1972), the Supreme Court refused to quash an appeal and stated in pertinent part:
>
> '...we do not mean to suggest that a final judgment on the original issue raised by the complaint could not have been awaited by the Defendants or that upon appealing from such

> final judgment, the action of the court below...could not then have been assigned for error. But, obviously, such a course would not have afforded expeditious procedure for the ultimate disposition of the entire controversy.
>
> The test is whether the order in its "practical aspect" is sufficiently final to be appealable. Bell v. Beneficial Consumer Discount Company, 465 Pa. 225, 348 A.2d 734 (1975). An order is "final" if it precludes a party from presenting the merits of his claim to the lower court. Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978). I would therefore consider this cause of action to be appealable because the "practical ramification" is "to completely deprive the litigant of his day in court so far as his claim is concerned." T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 372 A.2d 721 (1977). (Emphasis added).

Clearly, the dismissal of Count II of Appellant's Complaint precludes her from presenting the merits of that claim to the District Court. The decision of the Court of Appeals denying her appeal further serves to prevent her from

presenting the merits of her claim and therefore, "completely deprives her of her day in court so far as her claim is concerned." T.C.R. Realty, Inc., supra. Therefore, the decision of the Court of Appeals denying her Appeal on the ground of lack of jurisdiction due to lack of finality constituted error and warrants reversal. Furthermore, the cumulative effect of the District Court's dismissal of Count II of Appellant's Complaint and the Court of Appeals' denial of her Appeal serves not only to effectively preclude Appellant from an opportunity to be heard as to Count II, but also to deny her the recovery under the Pennsylvania Consumer Protection Law to which she deems herself entitled.

"The fundamental requirements of due process is the opportunity to be heard

'at a meaningful time and in a meaningful manner'". Mathews v. Eldrige, supra. Due process, at a minimum, requires any reasonable procedure appropriate to the circumstances which fairly protects an individual from arbitrary action. Mathews, supra; Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977); Burgess v. Miller, 492 F. Supp. 1284 (1980). (Emphasis added).

Due process, unlike some legal rules, is not a rigid concept with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedural protections as the particular situation demands. Jones v. Morris, 541 F. Supp. 11 (1981), citing Mathews, supra at 33, 96 S. Ct. at 902. (Emphasis added). Accordingly, the Mathews court, supra, used the

traditional balancing test to determine whether the procedures involved prior to the deprivation of a property interest were constitutionally sufficient. They stated:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors:
> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Mathews, supra at 335, 96 S. Ct. at 903; Landon v. Plasencia, 103 S. Ct. 321 (1982).

A reading of Talamini's Complaint reflects that the private interest, namely, relief under the Pennsylvania Consumer Protection Law, that has been

affected by the official action, namely, denial of any meaningful presentation of her claim on the merits, is substantial enough so as to warrant that she be permitted an opportunity to be heard prior to being deprived of that interest. Coupling that interest with the risk of an erroneous deprivation of such interest through the procedures used is evidence of the obvious error committed by the Court of Appeals and the process which Appellant is due.

Furthermore, it is elementary that procedural due process is necessitated only if there has been a taking or deprivation of a protected interest. Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972); Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (C.A.3d Cir. 1982). If the

Plaintiff satisfies this threshold requirement by showing that he has been deprived of such an interest, the court must then determine whether the Plaintiff was afforded sufficient procedural protection. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972); Yashon v. Hunt, 696 F.2d 468 (1983).

The Pennsylvania Legislature, in enacting the Consumer Protection Law, supra, provided statutory relief in the nature of treble damages for violations of that Law. The right to that relief for an enumerated violation, therefore, would constitute a protected interest.

Having satisfied the threshold requirement, a determination must be made as to the sufficiency of the procedural protection to which Plaintiff has been

afforded. The effect of the District Court's and Court of Appeals' decisions yields the conclusion that Plaintiff not only has been denied any meaningful procedural protection but also has been deprived of this substantial and protected interest.

Talamini has asserted a valid and substantial cause of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, supra. However, the Court of Appeals, following the dismissal by the District Court of Count II of her Complaint (stating a cause of action under the Consumer Protection Law), has denied her the due process of law to which she is reasonably entitled under the Fifth Amendment to the U.S. Constitution, namely, an opportunity to be heard "at a meaningful time and in a

meaningful manner." Mathews, supra. Due process requires, at a minimum, that a litigant be afforded "any reasonable procedure appropriate to the circumstances which fairly protects an individual from arbitrary action." Mathews, supra; Ingraham, supra; Burgess, supra. It also requires consideration of the private interest that will be affected by the official action. Mathews, supra. An assessment of Talamini's interest sought to be protected under the Consumer Protection Law and the Pennsylvania Legislature's intent to provide that relief under the Law, supra, to which she claims entitlement, coupled with the denial of procedural protection to which she is reasonably due, warrants that the

decision of the Court of Appeals be reversed and that the matter be remanded to that Court for a full hearing on the merits.

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IV. Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 14, 1983

NO. 83-1625

TALAMINI, FLORENCE, etc.

vs.

ALLSTATE INSURANCE COMPANY

Florence Talamini, Appellant

(E.D.Pa. Civil No. 83-3292)

Present: GIBBONS, HUNTER and GARTH, Circuit Judges.

1. Appellee's motion to dismiss appeal for the reason that this Court does not have jurisdiction to hear this appeal, with costs taxed against appellant.

2. Appellant's response to appellee's motion to dismiss appeal.

in the above-entitled case.

Respectfully,

Deputy Clerk

7-5019

enc.
ad/dt

The foregoing Motion is/~~are~~ granted

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: October 24, 1983

ad/cc: Bruce Martin Ginsburg, Esq.
James J. McCabe, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TALAMINI, FLORENCE, Administratrix of the Estate of TALAMINI, JOHN A., Deceased	:	
VS	:	
ALLSTATE INSURANCE COMPANY	:	NO:

ORDER

AND NOW, this 15th day of August, 1983, for the reasons set forth in the accompanying memorandum, defendant's motion to dismiss count II of the complaint is GRANTED and plaintiff's motion to defer decision on the motion

to dismiss count II and to place this matter in suspense is DENIED.

BY THE COURT:

/s/ CLIFFORD SCOTT GREEN
CLIFFORD SCOTT GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TALAMINI, FLORENCE, Administratrix :
of the estate of TALAMINI, JOHN A., :
Deceased :
:
VS :
:
ALLSTATE INSURANCE COMPANY :

MEMORANDUM

GREEN, J. AUGUST 15, 1983

Pending before the court is the motion of defendant Allstate Insurance Company, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss count II of the complaint for failure to state a claim upon which relief can be granted. Plaintiff filed an answer and a memorandum of law in opposition to the motion. 1/

1/ Count I of the complaint seeks recovery under the Pennsylvania No-Fault Insurance Act, 40 P.S. § 1009.101 et seq.

Defendant argues, and plaintiff concedes, that D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co., 494 Pa. 501, 431 A.2d 966 (1981), precludes a private cause of action for violation of provisions of the Pennsylvania Unfair Insurance Practices Act, 40 P.S. 1171.1 et seq. ("UIPA"). However, plaintiff argues that count II is premised upon a statutory cause of action brought pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Act, and that UIPA is referred to in count II only as a standard by which the conduct of defendant, i.e., the alleged violation of the Uniform Trade Practices and Consumer Protection Law, may be measured.

The Pennsylvania appellate courts have not decided whether a private cause of action for the type of insurance company violations alleged in count II is available under the Trade Practices and Consumer Protection Law. However, the analysis in D'Ambrosia and other decisions of the Pennsylvania courts supports the conclusion that Judge Pollak's decision in Layton v. Liberty Mutual Fire Insurance Company, C.A. 81-2672, slip op. (E.D. Pa. Mar. 18, 1983) is correct and that the Pennsylvania appellate courts will restrict remedies for the type of insurance company misconduct alleged in count II to the Unfair Insurance Practices Act sanctions of the Insurance Commissioner and to private causes of action under the No-Fault Act.

Accordingly, I will grant defendant's motion to dismiss count II of the complaint.

In a letter dated July 21, 1983, plaintiff's counsel requested that this action be transferred to the suspense docket until the appeal in Layton, id. is decided. Defendant objects, claiming it will be prejudiced by the delay because of additional interest penalties to which it will be subject under Pennsylvania law. No purpose is served by placing the action in suspense at this time; therefore, discovery may continue in regard to count I of the complaint. If the decision of the Courts of Appeals in Layton requires reconsideration of the dismissal of count II, plaintiff's counsel may so move. Accordingly, the informal request

to place this matter in suspense will be denied.

IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

TALAMINI, Florence, Admini-:
stratrix of the Estate of :
John A. Talamini, Deceased :
Appellant :NO:83-1625
:
VS :
:
ALLSTATE INSURANCE COMPANY :
Appellee :

NOTICE OF APPEAL

TO THE CLERK OF THE COURT OF APPEALS:

Notice is hereby given that the Plaintiff/Appellant, Florence Talamini, Administratrix of the Estate of John A. Talamini, Deceased, appeals the Order entered on the 24th day of October, 1983, granting Appellee Allstate Insurance Company's Motion to Dismiss Appellant's Appeal.

This Appeal is being taken pursuant to 28 U.S.C.A. §1254.

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28 U.S.C.A. §1254 Courts of appeals; certiorari appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. §1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisidiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of

action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C.A. §1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjections thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are addition l parties.

40 Pa. C.S.A. §1009.101 et seq.
The Pennsylvania No-Fault Motor Vehicle Insurance Act

NO-FAULT MOTOR VEHICLE INSURANCE [NEW]

The No-fault Motor Vehicle Insurance Act, consisting of sections 1009.101 to 1009.701 of this title, was enacted by Act 1974, July 19, 1974, P.L. 489, No. 176, effective in twelve months, except subsection (a) of section 504 (§1009.504(a)) which became effective immediately.

§1009.102 Findings and Purposes

(a) Findings.-The General Assembly hereby finds and declares that:

(1) motor vehicles are the primary instrumentality for the transportation of individuals;

(2) the transportation of individuals by motor vehicle over Commonwealth highways and other highways

significantly affects intrastate commerce, particularly in metropolitan areas;

(3) the maximum feasible restoration of all individuals injured and compensation of the economic losses of the survivors of all individuals killed in motor vehicle accidents on Commonwealth highways, in intrastate commerce, and in activity affecting intrastate commerce is essential to the humane and purposeful functioning of commerce;

(4) to avoid any undue burden on commerce during the intrastate transportation of individuals, it is necessary and proper to have a Statewide low-cost, comprehensive, and fair system of compensating and restoring motor

vehicle accident victims and the survivors of deceased victims;

(5) exhaustive studies by the United States Department of Transportation, the Congress of the United States and the General Assembly have determined that the present basic system of motor vehicle accident and insurance law, which makes compensation and restoration contingent upon:

(A) every victim first showing that someone else was at fault;

(B) every victim first showing that he was without fault; and

(C) the person at fault having sufficient liability insurance and other available financial resources to pay for all the losses, is not such a low-cost, compresensive, and fair system;

(6) careful studies, intensive hearings, and some State experiments have demonstrated that a basic system of motor vehicle accident and insurance law which:

(A) assures every victim payment of all his basic medical and rehabilitation costs, and recovery of a reasonable amount of work loss, replacement services and survivor's loss; and

(B) eliminates the need to determine fault except when a victim is very seriously injured, is such a low-cost, comprehensive, and fair system;

(7) adoption of the system described in p ragraph (6) in place of the system described in paragraph (5) would remove an undue burden on commerce;

(8) throughout the Commonwealth there should be uniformity as to the essential elements of the system of motor vehicle accident and insurance law to avoid confusion, complexity, uncertainty, and chaos which would be engendered by a multiplicity of noncomplementary systems, but the need for a basic system does not require that the Commonwealth itself directly administer, operate, or direct the administration or operation of such system; and

(9) a Statewide low-cost, comprehensive, and fair system of compensating and restoring motor vehicle accident victims can save and restore the lives of countless victims by providing and paying the cost of services so that every victim has the opportunity to:

(A) receive prompt and comprehensive professional treatment; and

(B) be rehabilitated to the point where he can return as a useful member of society and a self-respecting and self-supporting citizen.

(10) It is necessary to afford required coverages for motor vehicles to economically disadvantaged individuals at rates not so great as to deny such individuals access to insurance which it is necessary for them to have in order to earn income and to be or remain gainfully employed.

(b) Purposes.-Therefore, it is hereby declared to be the policy of the General Assembly to establish at reasonable cost to the purchaser of insurance, a Statewide system of prompt and adequate

basic loss benefits for motor vehicle accident victims and the survivors of deceased victims.

§1009.103 Definitions

As used in this act:

"Added loss benefits" means benefits provided by added loss insurance in accordance with section 207 of this act.

"Allowable expense" means reasonable charges incurred for, or the reasonable value of (where no charges are incurred), reasonably needed and used products, services, and accommodation for:

(A) professional medical treatment and care;

(B) emergency health services;

(C) medical and vocational rehabilitation services;

(D) expenses directly related to the funeral, burial, cremation, or other form of disposition of the remains of a deceased victim, not to exceed one

thousand five hundred dollars ($1,500); and

The term does not include that portion of a charge for a room in a hospital, clinic, convalescent, or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semiprivate accommodations, unless more intensive care is medically required; or any amount includable in work loss, replacement services loss, or survivor's loss.

"Basic loss benefits" means benefits provided in accordance with this act for the net loss sustained by a victim, subject to any applicable limitations, exclusions, deductibles, waiting periods,

disqualifications, or other terms and conditions provided or authorized in accordance with this act. Basic loss benefits do not include benefits for damage to property. Nor do basic loss benefits include benefits for net loss sustained by an operator or passenger of a motorcycle.

"Commissioner" means the Insurance Commissioner.

"Department" means the Pennsylvania Department of Transportation.

"Emergency health services" means services necessary to mitigate injury to any victim during the period immediately and proximately following an accident including, but not limited to, communications, transportation, and treatment by medical and paramedical personnel, and

which are supplied or provided by any person accredited or certified by an emergency health services system.

"Emergency health services system" means a system which provides for the arrangement of personnel, facilities, and equipment for the effective and coordinated delivery in an appropriate geographical area of health care services under emergency conditions arising out of the maintenance or use of a motor vehicle, which is administered by a public or nonprofit private entity which has the authority and the resources to provide effective administration, and which is operating in accordance with applicable requirements, conditions, and regulations.

"Government" means the government of the United States, any state, any political subdivision of a state, any instrumentality or two or more States, or any agency, subdivision of a state, any instrumentality of two or more states, or any agency, subdivision, or department of any such government, including any corporation or other association organized by a government for the execution of a government program and subject to control by a government, or any corporation or agency established under an interstate compact or international treaty.

"Injury" means accidentally sustained bodily harm to an individual and that individual's illness, disease, or death resulting therefrom.

"Insurance" means a contract, self-insurance, or any other legally binding obligation to pay or provide no-fault benefits or any required tort liability.

"Insured" means:

(A) an individual identified by name as an insured in a contract of basic loss insurance complying with this act; and

(B) a spouse or other relative of a named insured, a minor in the custody of a named insured, and a minor in the custody of a relative of a named insured if-

(i) not identified by name as an insured in any other contract of basic restoration insurance complying with this act; and

(ii) in residence in the same household with a named insured.

An individual is in residence in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

"Insurer" means a legally constituted entity, other than a self-insurer or an obligated government, which is authorized under state law to provide security covering a motor vehicle in such state.

"Loss" means accrued economic detriment resulting from injury arising out of the maintenance or use of a motor vehicle consisting of, and limited to, allowable expense, work loss, replacement services loss, and survivor's lo s.

"Loss of income" means gross income actually lost by a victim or that would have been lost but for any income continuation plan, reduced by:

(A) eighty percent (80%) of any income which such individual earns from substitute work;

(B) income which such individual would have earned in available substitute work he was capable of performing but unreasonably failed to undertake; or

(C) any income which such individual would have earned by hiring an available substitute to perform self-employment services but unreasonably failed to do.

"Maintenance or use of a motor vehicle" means maintenance or use of a

motor vehicle as a vehicle including incident to its maintenance or use as a vehicle, occupying, entering into, or alighting from it. Maintenance or use of a motor vehicle does not include:

(A) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or

(B) conduct in the course of loading or unloading a motor vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

"Medical and vocational rehabilitation services" means services necessary to reduce disability and to restore the physical, psychological,

social, and vocational functioning of a victim. Such services may include, but are not limited to, medical care, diagnostic and evaluation procedures, physical and occupational therapy, other necessary therapies, speech pathology or audiology, optometric services, nursing care under the supervision of a registered nurse, medical social services, vocational rehabilitation and training services, occupational licenses and tools, and transportation where necessary to secure medical and vocational rehabilitation services. A basic loss obligor is not obligated to provide basic loss benefits for allowable expense for medical and vocational rehabilitation services unless the facility in which or through which such

services are provided has been accredited by the Department of Health, the equivalent governmental agency responsible for health programs, or the accrediting designee of such department or agency of the State in which such services are provided, as being in accordance with applicable requirements and regulations.

"Motor vehicle" means a vehicle of a kind required to be registered under the act of April 29, 1959 (P.L. 58, No 32), known at The Vehicle Code.

"Net loss" means loss less benefits or advantages required to be subtracted from loss in calculating net loss pursuant to this act.

"Noneconomic detriment" means pain, suffering, inconvenience, physical

impairment, and other nonpecuniary damage recoverable under the tort law applicable to injury arising out of the maintenance or use of a motor vehicle. The term does not include punitive or exemplary damages.

"No-fault benefits" means basic loss benefits, added loss benefits, or both.

"No-fault insurance" means basic loss insurance, added loss insurance, or both.

"Obligor" means an insurer, self-insurer, or obligated government providing no-fault benefits in accordance with this act.

"Owner" means an individual, government, corporation, company, association, firm, partnership, joint stock company, foundation, institution,

society, union, club, church, or any other group of persons organized for any purpose, other than a lienholder or secured party, that owns or has title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another. The term includes a lessee of a motor vehicle having the right to possession under a lease with option to purchase.

"Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed, not for income, but for the benefit of himself or his family, if he had not been injured.

"Secretary" means the Pennsylvania Secretary of Transportation.

"Secured vehicle" means a motor vehicle for which security is provided in accordance with section 104 of this act.

"Security covering a motor vehicle," "security covering the vehicle," and "security" means the security which is provided in accordance with section 104 of this act.

"Self-insurer" means an owner or any person providing security pursuant to subsection (b) or (c) of section 104 of this act.

"State" means a state of the United States, the District of Columbia, Guam, and the Virgin Islands.

"State vocational rehabilitation agency" means the agency in the Commonwealth which administers the Commonwealth plan for vocational

rehabilitation services under the Federal Vocational Rehabilitation Act. (29 U.S.C. 35)

"Survivor" means:

(A) spouse; or

(B) child, parent, brother, sister or relative dependent upon the deceased for support.

"Survivor's loss" means the:

(A) loss of income of a deceased victim which would probably have been contributed to a survivor or survivors if such victim had not sustained the fatal injury; and

(B) expenses reasonably incurred by a survivor or survivors, after a victim's death resulting from injury, in obtaining ordinary and necessary services in lieu of those which

the victim would have performed, not for income, but for their benefit, if he had not sustained the fatal injury, reduced by expenses which the survivor or survivors would probably have incurred but avoided by reason of the victim's death resulting from injury.

"Victim" means an individual who suffers injury arising out of the maintenance or use of a motor vehicle; "deceased victim" means a victim suffering death resulting from injury.

"Without regard to fault" means irrespective of fault as a cause of injury.

"Work loss" means:

(A) loss of gross income of a victim, as calculated pursuant to the

provisions of section 205 of this act; and

(B) reasonable expenses of a victim for hiring a substitute to perform self-employment services, thereby mitigating loss of income, or for hiring special help, thereby enabling a victim to work and mitigate loss of income.

§1009.104 Required motor vehicle insurance

(a) Security covering a motor vehicle-Every owner of a motor vehicle which is registered or which is operated in this Commonwealth by the owner or with his permission, shall continuously provide security covering such motor vehicle while such vehicle is either present or registered in the Commonwealth. Security shall be provided

for the payment of basic loss benefits, and for the payment of sums up to a total limit of thirty thousand dollars ($30,000) which the owner or any person operating the vehicle with the express or implied permission of the owner may become liable to pay as damages because of bodily injury or death arising out of any one accident (subject to a sublimit of fifteen thousand dollars ($15,000) for damages arising out of the bodily injury or death of any one person) and for the payment of damages for injury to or destruction of property in any one accident of amounts up to a total limit of five thousand dollars ($5,000). The owner or any other person may provide security covering a motor vehicle by a contract of insurance with an insurer or

by qualifying as a self-insurer or as an obligated government.

(b) Self-insurance.-Self-insurance, subject to approval of the commissioner and department, is effected by filing with the department in satisfactory form:

(1) a continuing undertaking by the owner or other appropriate person to pay basic restoration benefits and any tort liability required in amounts not less than those required, by subsection (a) of this section, to perform all obligations imposed in accordance with this act, and to elect to pay such added restoration benefits as are specified in the undertaking;

(2) evidence that appropriate provision exists for prompt and efficient administration of all claims, benefits,

and obligations provided in accordance with this act; and

(3) evidence that reliable financial arrangements, deposits, resources, or commitments exist providing assurance substantially equivalent to that afforded by a contract of insurance complying with this act for payment of no-fault benefits, any required tort liability, and performance of all other obligations imposed in accordance with this act.

(c) Obligated government.-A government may provide security with respect to any motor vehicle owned or operated by it by lawfully obligating itself to pay basic restoration benefits in accordance with this act, and such

added restoration benefits as are specified in the undertaking.

(d) Obligations upon termination of security.-An owner of a motor vehicle who ceases to maintain the security required in accordance with this act shall immediately surrender the registration certificate and license plates for the vehicle to the department and may not operate or permit operation of the vehicle in this Commonwealth until security has again been furnished as required in accordance with this act. A person other than the owner who ceases to maintain such security shall immediately notify the owner and the department, who may not operated or permit operation of the vehicle until security has again been furnished. An insurer who has issued a

contract of insurance and knows or has reason to believe the contract is for the purpose of providing security shall immediately give notice to the department of the termination of the insurance. If the commissioner or department withdraws approval of security provided by a self-insurer or knows that the conditions for self-insurance have ceased to exist, he shall immediately give notice thereof to the department. These requirements may be modified or waived by the department.

§1009.105 Availability of insurance

(a) Plan.-

(1) The commissioner shall establish and implement or approve and supervise a plan assuring that any required no-fault benefits and tort

liability coverage for motor vehicles will be conveniently and expeditiously available, subject only to payment or provisions for payment of the premium, to each individual who cannot conveniently obtain insurance through ordinary methods at rates not in excess of those applicable to similarly situated individuals under the plan. The plan may provide reasonable means for the transfer of individuals insured thereunder into the ordinary market, at the same or lower rates, pursuant to regulations established by the commissioner. The plan may be implemented by assignment of applicants among insurers, pooling, any joint insuring or reinsuring arrangement, or any other method, that results in all applicants being conveniently afforded

the insurance coverages on reasonable and not unfairly discriminatory terms.

(2) The plan shall make available added loss benefits and tort liability coverage together with other contract provisions which the commissioner determines are reasonably needed by applicants and are commonly afforded in voluntary markets. The plan must also assure that there is available through the private sector or otherwise to all applicants adequate premium financing or provision for the installment payment of premiums subject to customary terms and conditions.

(3) All insurers writing no-fault benefits and tort liability coverages in this Commonwealth shall participate in the plan. The plan shall provide for

equitable apportionment, among all participating insurers writing any insurance coverage required under the plan, of the financial burdens of insurance provided to applicants under the plan and the costs of operation of the plan.

(4) Subject to the supervision and approval of the commissioner, insurers may consult and agree with each other and with other appropriate persons as to the organization, administration, and operation of the plan and as to rates and rate modifications for insurance coverages provided under the plan. Rates and rate modifications adopted or charged for insurance coverages provided under the plan shall:

(A) be first adopted or approved by the commissioner; and

(B) be reasonable and not unfairly discriminatory among similarly situated applicants for insurance pursuant to regulations established by the commissioner.

(5) To carry out the objectives of this subsection, the commissioner may adopt rules, make orders, enter into agreements with other governmental and private entities an individuals, and form and operate or authorize the formation and operation of bureaus and other legal entitles.

(b) Cancellation, refusal to renew, or other termination of insurance.- Cancellation, refusal to renew and other termination of insurance shall

be provided for in accordance with the provisions of the act of June 5, 1968 (P.L. 140, No. 78) entitled "An act regulating the writing, cancellation of or refusal to renew policies of automobile insurance; and imposing powers and duties on the Insurance Commissioner thereof."

§1009.106 Payment of claims for no-fault benefits

(a) In general.-

(1) No-fault benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as allowable expenses, work loss, replacement services loss, or survivor's loss is sustained.

(2) No-fault benefits are overdue if not paid within thirty days

after the receipt by the obligor of each submission of reasonable proof of the fact and amount of loss sustained, unless the obligor designates, upon receipt of an initial claim for no-fault benefits, periods not to exceed thirty-one days each for accumulating all such claims received within each such period, in which case such benefits are overdue if not paid within fifteen days after the close of each such period. If reasonable proof is supplied as to only part of a claim, but the part amounts to one hundred dollars ($100) or more, benefits for such part are overdue if not paid within the time mandated by this paragraph. An obligation for basic loss benefits for an item of allowable expense may be discharged by the obligor by

reimbursing the victim or by making direct payment to the supplier or provider of products, services, or accommodations within the time mandated by this paragraph. Overdue payments bear interest at the rate of eighteen per cent (18%) per annum.

(3) A claim for no-fault benefits shall be paid without deduction for the benefits or advantages which are to be subtracted from loss in calculating net loss if such benefits or advantages have not been paid or provided to such claimant prior to the date the no-fault benefits are overdue or the no-fault benefits claim is paid. The obligor is thereupon entitled to recover reimbursement from the person obligated to pay or provide such benefits or

advantages or from the claimant who actually received them.

(4) An obligor may bring an action to recover reimbursement for no-fault benefits which are paid upon the basis of an intentional misrepresentation of a material fact by a claimant or a supplier or provider of an item of allowable expense, if such obligor reasonably relied upon such misrepresentation. The action may be brought only against such supplier or provider, unless the claimant has intentionally misrepresented the facts or knew of the misrepresentation. An obligor may offset amounts he is entitled to recover from the claimant under this paragraph against any no-fault benefits otherwise due.

(5) An obligor who rejects a claim for basic loss benefits shall give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss. Such notice shall specify the reason for such rejection and inform the claimant of the terms and conditions of his right to obtain an attorney. If a claim is rejected for a reason other than the person is not entitled to basic loss benefits claimed, the written notice shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau.

(b) Release or settlement of claim.-

(1) Except as otherwise provided in this subsection, no-fault benefits shall not be denied or terminated because the victim executed a release or other settlement agreement. A claim for no-fault benefits may be discharged by a settlement agreement for an agreed amount payable in installments or in a lump sum, if the reasonably anticipated net loss does not exceed two thousand five hundred dollars ($2,500). In all other cases, a claim may be discharged by a settlement to the extent authorized by law and upon a finding, by a court of competent jurisdiction, that the settlement is in the best interest of the claimant and any beneficiaries of the settlement, and that the claimant understands and consents to such settlement, and upon payment by the

restoration obligor of the costs of such proceeding including a reasonable attorney's fee (based upon actual time expended) to the attorney selected by or appointed for the claimant. Such costs may not be charged to or deducted from the proceeds of the settlement. Upon approval of the settlement, the court may make appropriate orders concerning the safeguarding and disposing of the proceeds of the settlement and may direct as a condition of the settlement agreement, that the restoration obligor pay the reasonable cost of appropriate future medical and vocational rehabilitation services.

(2) A settlement agreement for an amount payable in installments shall be modified as to amounts to be paid in the

future, if it is shown that a material and substantial change of circumstances has occurred or that there is newly-discovered evidence concerning the claimant's physical condition, loss, or rehabilitation which could not have been known previously or discovered in the exercise of reasonable diligence.

(3) A settlement agreement may be set aside if it is procured by fraud or if its terms are unconscionable.

(c) Time limitations on actions to recover benefits.-

(1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable

diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant; may be commenced not later than two years after the last payment of benefits.

(2) If no-fault benefits have not been paid to the deceased victim or his survivor or survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any

survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If no-fault benefits have been paid for loss suffered by a victim before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or six years after the last payment of benefits, whichever is earlier.

(3) If timely action for basic restoration benefits is commenced against an obligor and benefits are denied because of a determination that the obligor's coverage is not applicable to the claimant under the provisions of section 204 of this act, an action

against the applicable obligor or the obligor to whom a claim is assigned under an assigned claims plan may be commenced not later than sixty days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(4) Except as paragraph (1), (2), or (3) prescribes a longer period, an action by a claimant on an assigned claim which has been timely presented in accordance with the provisions of section 108(c) of this act may not be commenced more than sixty days after the claimant receives written notice of rejection of the claim by the restoration obligor to which it was assigned.

(5) If a person entitled to no-fault benefits is under a legal

disability when the right to being an action for the benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action.

(d) Assignment of benefits.-Omitted

§1009.107 Attorney's fees and costs

Fees of claimant's attorney-

(1) If any overdue no-fault benefits are paid by the obligor after receipt by the obligor of notice of representation of a claimant in connection with a claim or action for the payment of no-fault benefits, a reasonable attorney's fees (based on actual time expended) shall be paid by the obligor to such attorney. No part of the attorney's fee for representing the claimant in connection with such claim or

action for no-fault benefits shall be charged or deducted from benefits otherwise due to such claimant and no part of such benefits may be applied to such fee.

(2) If, in any action by a claimant to recover no-fault insurance benefits from an obligor, the court determines that the claim or any significant part thereof is fraudulent or so excessive as to have no reasonable foundation, the court may award the obligor's attorney a reasonable fee based upon actual time expended. The court, in such case, may direct that the fee shall be paid by the claimant or that the fee may be treated in whole or in part as an offset against any benefits due or to become due to the claimant.

(3) If, in any action by a claimant to recover no-fault benefits from an obligor, the court determines that the obligor has denied the claim or any significant part thereof without reasonable foundation, the court may award the claimant's attorney a reasonable fee based upon actual time expended.

§1009.108 Assigned claims plan-Omitted

§1009.109 Rates-Omitted

§1009.110 Motor vehicles in interstate travel-Omitted

§1009.111 Rights and duties of obligor

(a) Reimbursement and subrogation.

(1) Except as provided in paragraphs (2) and (3) of this subsection, an obligor:

(A) does not have and may not contract, directly or indirectly, in whole or in part, for a right of reimbursement from or subrogation to the proceeds of a victim's claim for relief or to a victim's cause of action for noneconomic detriment; and

(B) may not directly or indirectly contract for any right of reimbursement based upon a determination of fault from any other obligor not acting as a reinsurer for no-fault benefits which it has paid or is obligated to pay as a result of injury to a victim.

(2) Whenever an individual who receives or is entitled to receive no-fault benefits for an injury has a claim or cause of action against any

other person causing the injury as based upon a determination of fault, the obligor is subrogated to the rights of the claimant only for:

(A) elements of damage compensated for by security for the payment of no-fault benefits in excess of the minimum basic loss benefits required under this act are recoverable; and

(B) the obligor has paid or become obligated to pay accrued or future no-fault benefits in excess of the minimum basic loss benefits required under this act.

(3) Nothing in this subsection shall preclude any person supplying or providing products, services, or accommodations from contracting or otherwise providing for a right of

reimbursement to any basic restoration benefits for allowable expense.

(4) In no event shall any entity providing benefits other than no-fault benefits to an individual as described in section 203 of this act, have any right of subrogation with respect to said benefits.

(b) Duty to pay basic loss benefits.-An obligor providing security for the payment of basic loss benefits shall pay or otherwise provide such benefits without regard to fault to each individual entitled thereto, pursuant to the terms and conditions of this act.

(c) Indemnity.-Omitted

(d) Referral for rehabilitation services.-Omitted

ARTICLE II. RIGHTS TO BENEFITS

§1009.201 Right to basic loss benefits; limitation on benefits

(a) Accident within this State.-If the accident resulting in injury occurs in this Commonwealth, any victim or any survivor of a deceased victim is entitled to receive basic loss benefits in accordance with the provisions of this act.

(b) Accident outside this State.-Omitted

§1009.202 Basic loss benefits

(a) Allowable expense limits.-Allowable expense, as defined in section 103 of this act shall be provided or the equivalent in the form of a contract to provide for services required.

(b) Work loss limits.-Work loss, as defined in section 103 shall be provided:

(1) up to a monthly maximum of:

(A) one thousand dollars($1,000) multiplied by a fraction whose numerator is the average per capita income in this Commonwealth and whose denominator is the average per capita income in the United States, according to the latest available United States Department of Commerce figures; or

(B) the disclosed amount, in the case of a named insured who, prior to the accident resulting in injury, voluntarily discloses his actual monthly earnings to his obligor and agrees in writing with such obligor that such sum shall measure work loss; and

(2) up to a total amount of fifteen thousand dollars ($15,000).

(c) Replacement services losses.- Replacement services loss, as defined in section 103 shall be provided up to a daily maximum of twenty-five dollars ($25) for an aggregate period of one year.

(d) Survivors losses.-Survivors loss, as defined in section 103 shall be provided in an amount not to exceed five thousand dollars ($5,000).

(e) Deductibles; waiting period.- Allowable expense, work loss and replacement services loss may include provisions to provide:

(1) a deductible not tc exceed on hundred dollars ($100) for each individual; or

(2) with respect to work loss or replacement services only, a waiting period not to exceed one week.

Such deductible or waiting period shall be elected in writing upon a form approved by the Insurance Commissioner and, if elected, shall be effective only as against the named insured and his or her immediate family.

§1009.203 Collateral benefits

(a) If benefits other than no-fault benefits are provided to an individual through a program, group, contract or other arrangement for which some other person pays in whole or in part that would inure to the benefit of a victim or the survivor of a deceased victim injured as a result of an accident in the absence of no-fault benefits, then any reduction

or savings in the direct or indirect cost to such person of such benefits resulting from the existence of no-fault benefits shall be returned to such individual or utilized for his benefit.

(b) The owner or operator of a motor vehicle may elect to provide for security in whole or in part for the payment of basic loss benefits through a program, group, contract or other arrangement that would pay to or on behalf of the victim or members of his family residing with him or the survivor of a deceased victim, allowable expense, loss of income, work loss, replacement services loss and survivors loss. In all such instances, each contract of insurance issued by an insurer shall be construed to contain a provision that all

benefits provided therein shall be in excess of any valid and collectible benefits otherwise provided throughs such program, group, contract or other arrangement as designated at the election of the owner or operator which shall be primary.

(c) An insurer providing basic loss benefits and tort liability in accordance with the provisions of subsection (b) above shall reduce the cost of such contract of insurance to reflect the anticipated reduction in basic loss benefits payable by the insurer by reason of the election of the owner or operator to provide substitute security.

§1009.204 Source of basic restoration benefits

(a) Applicable security.-The security for the payment of basic loss benefits applicable to an injury to:

(1) an employee, or to the spouse or other relative of any employee residing in the same household as the employee, if the accident resulting in injury occurs while the victim or deceased victim is driving or occupying a motor vehicle furnished by such employee's employer is the security for the payment of basic loss benefits covering such motor vehicle or, if none, any other security applicable to such victim;

(2) an insured is the security under which the victim or deceased victim is insured;

(3) the driver or other occupant of a motor vehicle involved in any accident resulting in injury who is not an insured is the security covering such vehicle;

(4) an individual who is not an insured or the driver or other occupant of a motor vehicle involved in an accident resulting in injury is the security covering any motor vehicle involved in such accident. For purposes of this paragraph, a parked and unoccupied motor vehicle is not a motor vehicle involved in an accident, unless it was parked so as to cause unreasonable risk of injury; and

(5) any other individual is the applicable assigned claims plan.

(b) Multiple sources of equal property.-If two or more obligations to pay basis loss benefits apply equally to an injury under the priorities set forth in subsection (a) of this section, the obligor against whom a claim is asserted first shall process and pay the claim as if wholly responsible. Such obligor is thereafter entitled to recover contribution pro rata from any other such obligor for the basic loss benefits paid and for the costs of processing the claim. If contribution is sought among obligors responsible under paragraph (4) of subsection (a) of this section proration shall be based on the number of involved motor vehicles.

§1009.205 Work loss

(a) Regularly employed.-The work loss of a victim whose income prior to the injury was realized in regular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim sustains loss of income during the accrual period.

(b) Seasonably employed.-The work loss of a victim whose income is realized in irregular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by the number of weeks he normally works; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim was unable to perform and would have performed work during the accrual period but for the injury.

(c) Not employed.-The work loss of a victim who is not employed when the accident resulting in injury occurs shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, if any, the victim would reasonably have been expected to realize income during the accrual period.

(d) Definitions.-As used in this section:

"Probably annual income" means, absent a showing that it is or would be some other amount, the following:

(A) twelve times the monthly gross income earned by the victim from work in the month preceding the month in which the accident resulting in injury occurs, or the average annual income earned by the victim from work during the years, not to exceed three, preceding the year in which the accident resulting in injury occurs, whichever is greater, for a victim regularly employed at the time of the accident;

(B) the average annual gross income earned by the victim from work during the years in which he was employed, not to exceed three, preceding the year in which the accident resulting

in injury occurs, for a victim seasonably employed or not employed at the time of the accident; or

(C) the average annual gross income of a production or nonsupervisory worker in the private nonfarm economy in the state in which the victim is domiciled for the year in which the accident resulting in injury occurs, for a victim who has not previously earned income from work.

"Work week" means the number of days an individual normally works in a seven-day period; "weekly income" means income earned during a work week.

§1009.206 Net loss-Omitted

§1009.207 Added loss benefits

(a) Mandatory offering.-Obligors providing security for the payment of

basic loss benefits shall offer or obligate themselves to provide added loss benefits for injury or damage arising out of the ownership, maintenance, or use of a motor vehicle, including:

(1) loss excluded from basic loss benefits by limits on allowable expense, work loss, replacement services loss, and survivor's loss;

(2) benefits for damage to property;

(3) benefits for loss of use of a motor vehicle;

(4) benefits for expense for remedial religious treatment and care;

(5) for physical damage to a motor vehicle, a coverage for all collision and upset damage, subject to an optional deductible; and

(6) for economic detriment, a coverage for work loss sustained by a victim in excess of limitations on basic loss benefits for work loss.

(b) Additional loss coverage.- Subject to the approval of terms and forms by the commissioner, obligors may offer or obligate themselves to provide other added loss coverages.

The commissioner may adopt rules requiring that insurers providing basic loss insurance offer, in accordance with this act, any other specified added loss coverages and promulgate regulations will respect thereto.

§1009.208 Ineligible claimants-Omitted

§1009.209 Other provisions

(a) Included coverage.-A contract of insurance covering liability arising

out of the ownership, maintenance, or use of a motor vehicle registered in this Commonwealth, shall include basic loss benefits and any other benefit coverages required by the no-fault plan for motor vehicle insurance in effect in this Commonwealth unless such contract provides tort liability coverages only in excess of any of those required by the no-fault plan.

(b) Approval of terms and forms.-Terms and conditions (including forms used by insurers) of any contract, certificate, or other evidence of insurance sold or issued pursuant to this State's no-fault plan for motor vehicle insurance in accordance with this act and providing no-fault benefits or any required tort liability are subject to

approval and regulation by the commissioner. The commissioner shall approve only terms and conditions which are consistent with the purposes of this act and fair and equitable to all persons whose interest may be affected. The commissioner may reasonably limit by rule the variety of coverage available in order to give purchasers of insurance a reasonable opportunity to compare the cost of insuring with various insurers.

ARTICLE III. TORT LIABILITY

§1009.301 Tort Liability-Omitted

ARTICLE IV. EXAMINATION, TREATMENT AND REHABILITATION OF INJURED PERSONS: DISCOVERY

§1009.401 Examination-Omitted

§1009-402 Report of examination-Omitted

§1009.403 Refusal to comply-Omitted

§1009.404 Court order; obligor responsibility-Omitted

§1009.405 Court order; rehabilitative training-Omitted

§1009.406 Compliance with court order-Omitted

§1009.407 Customary charges for treatment-Omitted

§1009.408 Earings statement-Omitted

ARTICLE V-UNINSURED MOTORISTS, ANTI-DISCRIMINATION, SECURITY REQUIRED CANCELLATION, SUBROGATION, RATE REDUCTION, SELF INSURANCE, TERMINATION OF SECURITY, CONSUMER INFORMATION, SEVERABILITY

§1009.501 Uninsured motorist-Omitted

§1009.502 Anti-discrimination

There shall be no unfair discrimination by insurers in eligibility rules and underwriting practices by reason of race, religion, nationally or ethnic group, age, sex, family size, occupation, place of residence or marital status. The terms "eligibility rules and underwriting practices" do not include the making or promulgation of rates if made and promulgated in accordance with the appropriate rate regulatory act of this Commonwealth and regulations pursuant thereto as promulgated by the commissioner.

§1009.503 Separability-Omitted

§1009.504 Policy requirements and premium changes-Omitted

§1009.505 Roll on benefits-Omitted

ARTICE VI. PENALTIES

§1009.601 Operation of a vehicle without security-Omitted

§1009.602 Excessive charges-Omitted

§1009.603 Violations by obligor

Any obligor who shall advertise, offer or contract for, or otherwise provide for no-fault benefits or tort liability insurance coverages required by this act, and who, by a pattern of business transactions violates any of the provisions of this act, shall be guilty of a summary offense and upon conviction thereof shall be sentenced to pay a fine of not more than one thousand dollars ($1,000) for each violation.

§1009.701 Effective date

This act shall take effect in twelve months: Provided, however, That subsection (a) of section 504 shall take effect immediately.

1974, July 19, P.L. 489, No. 176, Art. VII, §701, effective in 12 months.

73 Pa. C.S.A. §201-1 et seq. Pennsylvania Unfair Trade Practices and Consumer Protection Law

UNFAIR COMPETITION ACTS OR PRACTICES

§201-1. Short title

This act shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

§201-2. Definitions

As used in this act.

(1) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

(2) "Person" means natural persons, corporations, trust, partnerships, incorporated or unincorporated associations, and any other legal entities.

(3) "Trade" and "commerce" mean the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.

(4) "Unfair methods of competition" and "unfair or deceptive acts or practices" means any one or more of the following:

(i) Passing off goods or services as those of another;

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(iv) Using deceptive representations or designations of geographic origin in connection with goods or services;

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

(vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(viii) Disparaging the goods, services or business of another by false or misleading representation of fact;

(ix) Advertising goods or services with intent not to sell them as advertised;

(x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(xi) Making false or misleading statements of fact concerning the reasons

for, existence of, or amounts of price reductions;

(xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;

(xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon

the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the

scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and material for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars ($25) or less;

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to

or after a contract for the purchase of goods or services is made;

(xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

(xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;

(xvii) Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding.

§201-3. Unlawful acts or practices; exclusions

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as

defined by subclauses (i) through (xvii) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of this act are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employe of any radio or television station, or to any owner, publisher, printer, agent or employe of a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§201-3.1 Regulations-Omitted

§201-4. Restraining prohibited acts

Whenever the Attorney General or a District Attorney has reason to

believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice.

§201-4.1 Payment of costs and restitution

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any persons in interest any moneys or property, real or personal, which may

have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§201-5. Assurances of voluntary compliance-Omitted

§201.7. Contracts; effect of rescission-Omitted

§201.8. Civil penalties

(a) Any person who violates the terms of an injunction issued under section 4 of this act or any of the terms of an assurance of voluntary compliance duly filed in court under section 5 of this act shall forfeit and pay to the Commonwealth a civil penalty of not more than five thousand dollars ($5,000) for each violation. For the purposes of this section the court issuing an injunction

or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause shall be continued: and, in such cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.

(b) In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is wilfully using or has wilfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may

recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars ($1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under section 4 and 4.1 of this act.

§201-9. Forfeiture of franchise or right to do business; appointment of receiver-Omitted

§201-9.1 Powers of receiver-Omitted

§201-9.2 Private actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act

or practice declared unlawful by section 3 of this act may bring a private action, to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.

(b) Any permanent injunction, judgment or order of the court made under section 4 of this act shall be prima facie evidence in an action brought under section 9.2 of this act that the defendant used or employed acts or practices declare unlawful by section 3 of this act.

28 U.S.C.A. Rule 12(b)(6)

Defenses and Objections-When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:..., (6) failure to state a claim upon which relief can be granted,...

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No. 84-18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FLORENCE TALAMINI, ADMINISTRATRIX,
Appellant

v.

ALLSTATE INSURANCE COMPANY,
Appellee

On Appeal From the United States Court of Appeals
for the Third Circuit

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 84-18

FLORENCE TALAMINI, Administratrix,
Appellant

v.

ALLSTATE INSURANCE COMPANY,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee, Allstate Insurance Company, moves to dismiss the appeal herein for want of jurisdiction under 28 U.S.C. §1254 or to affirm the judgment of the Court of Appeals on the ground that it was without jurisdiction, and to award appellee double costs and attorneys' fees.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. §1254(2) over an appeal from a judgment that did not hold any state law invalid as repugnant to federal law?

2. Should this Court take certiorari jurisdiction under 28 U.S.C. §2103 of an appeal

(A) over which the Court of Appeals did not have jurisdiction; and (B) where the judgment of the Court of Appeals does not conflict with any decision of another federal appellate court, nor with any decision of the applicable State court of last resort, nor with any applicable decisions of this Court?

3. Was the Court of Appeals correct in dismissing for want of jurisdiction an appeal from an order disposing of only one of multiple claims where the district court did not direct entry of final judgment and did not determine that there was no just reason for delay?

STATEMENT OF THE CASE

This appeal arises out of an action for benefits provided under an insurance policy issued in accordance with the Pennsylvania No-fault Motor Vehicle Insurance Act ("No-fault Act"), 40 P.S. §1009.101, *et seq.*[1] Appellant, Florence Talamini ("Talamini") filed a two-count Complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania. Appellee, Allstate Insurance Company ("Allstate") removed the suit to the federal district court for the Eastern District of Pennsylvania on the basis of the court's diversity jurisdiction. 28 U.S.C. §§1332, 1441. Because Allstate has not paid the no-fault benefits which appellant claims in Count I of the Complaint, Count II alleged that Allstate's conduct violated the provisions of the Pennsylvania Unfair Insurance Practices Act ("UIPA"), 40 P.S. §1171.1, *et seq.*, and claimed up to three times the amount of those benefits and statutory penalties as damages under §201-9.2 of the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPA"). 73 P.S. §201-9.2

Allstate filed a motion to dismiss Count II of the Complaint pursuant to Fed.R.Civ.Proc. 12(b)(6) on the ground that no private right of action for the practices or conduct alleged exists under the UIPA or the UTPCPA, and thus Count II failed to state a claim upon which relief can be granted. The district court issued a memorandum and Order (A. 3-9) dismissing Count II and denying Talamini's motion to defer decision and place the action in suspense. The district court stated that, if any intervening decision by the Court of Appeals required reconsideration of the dismissal order, Talamini's counsel could so move. (A. 8-9).

Talamini appealed to the Court of Appeals for the Third Circuit. Allstate filed a motion to dismiss the appeal on grounds that the district court made no direction for entry of final judgment as to Count II upon an express determination that there was no just reason for delay.

1. Repealed, Act of February 12, 1984, P.L. _____, No. 11, §8.

Fed.R.Civ.Proc. 54(b). The Court of Appeals dismissed the appeal for want of jurisdiction. (A. 1)

ARGUMENT

The Court Should Dismiss this Appeal for Want of Jurisdiction Under 28 U.S.C. §1254 and Affirm the Judgment of the Court of Appeals

Appellant styles the instant proceeding as an "Appeal from the United States Court of Appeals for the Third Circuit" taken "pursuant to 28 U.S.C.A. §1254." Allstate submits that this Court does not have appellate jurisdiction herein and must, therefore, dismiss the appeal as described.

Appellate review by this Court of cases in the federal courts of appeals may be had only under 28 U.S.C. §1254(2) (1982). That section of the statute provides for Supreme Court review by appeal:

> by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . and the review on appeal shall be restricted to the Federal questions presented[.]

28 U.S.C. §1254(2).

The jurisdictional statement filed in this Court fails to raise any such appeal. In dismissing the appeal below, the Court of Appeals did not hold any State statute to be either invalid or repugnant to any federal law.

Therefore, this appeal is improper and should be dismissed for want of jurisdiction. *Bradford Elec. Co. v. Clapper*, 284 U.S. 221, 222-223 (1931).

Nor should the Court, on dismissing this improper appeal, take certiorari jurisdiction under 28 U.S.C. §2103. First, the Court of Appeals determined that it did not have jurisdiction. A writ of certiorari cannot properly be issued to require that court to send up a cause over which it has no jurisdiction. *Good Shot v. United States*, 179 U.S. 87, 88-89 (1900).

Second, this improper appeal does not present the special circumstances that characterize this Court's exercise of its certiorari jurisdiction.

The Court has taken certiorari jurisdiction when a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. *E.g., Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Sup.Ct.R. 17.1(a). The Court may take certiorari jurisdiction when a court of appeals decides a federal question in a manner conflicting with a state court of last resort. Sup.Ct.R. 17.1(a). The Court also may review by writ of certiorari a court of appeals decision on a federal question which the Court has not settled or which decision conflicts in any way with the Court's applicable decisions. Sup.Ct.R. 17.1(c).

There is no conflict among the various circuits as to the requirement for appeals under Fed.R.Civ.Proc. 54(b) ("Rule 54(b)"). To the contrary, the Courts of Appeals are in accord that they do not have jurisdiction over appeals of judgments, however designated, as to fewer than all claims in a suit without express determination by the district court that there is no just reason for delay. *Curtiss-Wright*, 446 U.S. at 5, 8. *E.g., Burney v. City of Pawtucket*, 728 F.2d 547 (1st Cir. 1984); *United States Fire Ins. Co. v. Smith Barney, Harris Upham & Co., Inc.*, 724 F.2d 650 (8th Cir. 1983); *Wolf v. Banco Nacional de Mexico*, 721 F.2d 660 (9th Cir. 1983); *Ivanov-McPhee v Washington Nat'l Ins. Co.*, 719 F.2d 927 (7th Cir. 1983); *Liskey v. Oppenheimer & Co., Inc.*, 717 F.2d 314 (6th Cir. 1983); *Para-Chem Southern, Inc. v. M. Lowenstein Corp.*, 715 F.2d 128 (4th Cir. 1983); *Aleut Tribe v. United States*, 702 F.2d 1015 (Fed. Cir. 1983); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365 (11th Cir.), *cert. denied*, _____ U.S. _____, 104 S.Ct. 239 (1983); *Wheeler Mach. Co. v. Mountain States Min. Enter., Inc.*, 696 F.2d 787 (10th Cir. 1983); *Sandoz v. Crain Bros., Inc.*, 694 F.2d 88 (5th Cir. 1982); *Shirey v.*

Bensalem Twp., 663 F.2d 472 (3rd Cir. 1981); *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978); *Knable v. Wilson*, 187 U.S. App. D.C. 48, 570 F.2d 957 (1977).

Hence, the dismissal of Talamini's improper appeal by the Court of Appeals for the Third Circuit was consistent with universal federal practice.

Furthermore, the Court of Appeals' dismissal of Talamini's improper piecemeal appeal does not conflict with any Pennsylvania Supreme Court decision on the question of finality of judgments for purposes of *federal* procedure. *See, e.g., Commonwealth v. Bolden*, 472 Pa. 602, 612-613 & n.8, 373 A.2d 90, 95 & n.8 (1977). In fact, as may be expected, the Pennsylvania Supreme Court has not rendered any decision concerning federal appellate court jurisdiction of final judgments as to fewer than all claims at trial under Fed.R.Civ.Proc. 54(b). Significantly, Pennsylvania's courts do not have a procedural provision analogous to Rule 54(b).

Since this Court's 1980 decision in *Curtiss-Wright, supra*, it has been settled that certain steps must be followed at the trial court level before any final judgment on one of multiple claims may be appealed. It is left to the sound judicial discretion of the district court whether to take those steps and to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. 446 U.S. at 8; *Dudo v. Schaeffer*, 93 F.R.D. 524, 530 (E.D.Pa. 1982). Where the district court makes no Rule 54(b) determination in such cases, a circuit court does not have jurisdiction over appeals from orders adjudicating fewer than all claims. *Shirey*, 663 F.2d at 475. *E.g., Aleut Tribe*, 702 F.2d at 1020-1021; *Clark v. United States*, 624 F.2d 3, 4 (2d Cir. 1980). When Talamini filed her notice of appeal from the nonappealable order dismissing Count II, she did not divest the district court of jurisdiction over this matter. *Griggs v. Provident Consumer Discount Co.*, 51 U.S.L.W. 3413 (U.S. Nov. 29, 1982), *citing Ruby v. Sec'y of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967).

Because the district court's judgment did not consider Count I of Talamini's Complaint, the judgment is partial dismissal only. There was no direction for entry of final judgment on Count II and no determination that there was no just reason for delay. The entirety of Talamini's lawsuit remains in the district court. A federal district court and a federal appellate court should not attempt to assert simultaneous jurisdiction over a case. *Griggs*, 51 U.S.L.W. at 3413. The Court of Appeals correctly dismissed the appeal for want of jurisdiction.

This purported appeal does not satisfy the jurisdictional requirements of 28 U.S.C. §1254(2) and, therefore, should be dismissed. Furthermore, since it fails to present the special circumstances that warrant a writ of certiorari, the Court should deny certiorari under 28 U.S.C. §2103. Moreover, since there is no reasonable ground for this "appeal" to be granted on a writ of certiorari, pursuant to 28 U.S.C. §2103,[2] Allstate requests that the Court award it double costs and attorneys' fees for actual time spent in connection with this purported appeal.

---

2. Section 107(2) of the No-fault Act, 40 P.S. §1009.107(2), also provides:

> If in any action by a claimant to recover no-fault benefits from an obligor, the court determines that the claim or any significant part thereof is fraudulent or so excessive as to have no reasonable foundation, the court may award the obligor's attorney a reasonable fee based upon actual time expended. The court, in such case, may direct that the fee shall be paid by the claimant or that the fee may be treated in whole or in part as an offset against any benefits due or to become due to the claimant.

CONCLUSION

The Court of Appeals did not invalidate any Pennsylvania statute as repugnant to the laws of the United States. That Court properly dismissed the appeal below because it did not have jurisdiction over a final judgment. Hence, this Court does not have jurisdiction of the purported appeal under 28 U.S.C. §1254(2).

Moreover, this matter fails to present any of the special circumstances under which this Court would grant a writ of certiorari. To the contrary, the judgment of the Court of Appeals is consistent with the applicable decisions of this Court and of every other federal court of appeals.

For these reasons, and for all the reasons set forth in the foregoing argument, appellee, Allstate Insurance Company requests that the Supreme Court dismiss this appeal or affirm the judgment of the Court of Appeals and award Allstate double costs and attorneys' fees incurred.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By_____

James J. McCabe

Dwight Reginald Whitt

APPENDIX

This Appendix sets forth the listing of Allstate Insurance Company's parents, subsidiaries and affiliates as required by Rule 28.1.

Allstate's parent corporation is Sears, Roebuck and Co. Allstate's affiliates and subsidiaries (except for its wholly owned subsidiaries, the wholly owned subsidiaries of Sears, Roebuck and Co. and the wholly owned subsidairies of their subsidiaries and wholly owned subsidiaries) are:

Allstate Insurance Company of Canada

Allstate Life Insurance Company of Canada

The Armstrong Rubber Company

Copolymer Rubber and Chemical Corporation

DeSota, Inc.

Kellwood Company

Roper Corporation

Sears Roebuck de Mexico, S.A. de C.V.

Ir dis Limited

Simpson-Sears Acceptance Co., Ltd.

Simpson-Sears Properties Ltd.

Universal-Rundle Corp.

"Affiliates" listed above are those which Allstate included as of December 31, 1981 in Item 2 of the Registration Statement which Allstate is required to file in its domiciliary state to comply with the Insurance Holding Company Systems Act, Ill. Ann. Stat. Ch. 73 §7431.1 *et seq*. Affiliates whose assets are less than one-half of 1% of Allstate's assets is available upon request.

SUPREME COURT OF THE UNITED STATES

FLORENCE TALAMINI, ADMINISTRATRIX OF ESTATE OF JOHN A. TALAMINI *v.* ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-18. Decided March 25, 1985

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

I agree that we should dismiss this appeal, but I would go beyond that. This appeal is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim. Such efforts should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court,* at least where, as here, the appellee has moved for an award of costs and fees.

Appellant, the administratrix of her husband's estate, filed a complaint in state court seeking insurance benefits from appellee. Count I of the complaint sought benefits under Pennsylvania's No-Fault Motor Vehicle Insurance Act, 40 Pa. Stat. Ann. §§ 1009.101–.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II alleged that appellee had violated Pennsylvania's Unfair Insurance Practices Act, *id.*, § 1171.1 *et seq.*, and sought statutory penalties under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 *id.*, § 201–9.2.

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*Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

Appellee removed the suit to Federal District Court based on the parties' diversity of citizenship. On appellee's motion, the District Court dismissed Count II for failure to state a claim upon which relief could be granted, holding that the Pennsylvania laws upon which appellant relied do not provide any private right of action. Appellant immediately appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals granted appellee's motion to dismiss on the grounds that the District Court decision was not a final judgment and that the Court of Appeals thus lacked jurisdiction. Appellant then filed a jurisdictional statement with this Court, asserting that the Court of Appeals' dismissal of her appeal was erroneous and a violation of due process.

The Court of Appeals' action was unquestionably correct. See 28 U. S. C. § 1291; Fed. Rule Civ. Proc. 54(b). Not only is appellant's appeal to this Court completely frivolous on the merits, but also her attempt to bring the case here by way of appeal is totally improper; appellate jurisdiction is plainly lacking. See 28 U. S. C. § 1254(2).

Appellee has moved for an award of costs and fees for its expense in responding to this frivolous appeal. We afforded appellant the opportunity to respond to this motion; appellant's response provided nothing to meet the claim that the appeal is demonstrably frivolous. I would grant the motion to the extent of awarding appellee $1000.00 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2.

It is suggested that two objectives justify the Court's refusal to apply Rule 49.2 in this and similar cases: (a) efficient use of the Court's time, and (b) affirmance of the principle of free access to the courts. Both objectives unquestionably are commendable, but the perspective is too narrow. Judicious use of the sanction of Rule 49.2 in egregious cases—and this is an egregious case—should discourage many of the patently meritless applications that are filed here each year. In the long run, this is the more effective

way to "minimize the time devoted to the disposition of applications that are plainly without merit," *ante*, at 3; after all, that is the whole purpose of Rule 49.2. Further, while freedom of access to the courts is indeed a cherished value, every misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process. The time this Court expends examining and processing frivolous applications is very substantial, and it is time that could be devoted to considering claims which merit consideration.

Rule 49.2 has a purpose which has too long been ignored; it is time we applied it. I would apply it here.

JUSTICE WHITE, believing that there is no final judgment to review, would dismiss for want of jurisdiction.

JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

FLORENCE TALAMINI, ADMINISTRATRIX OF ESTATE OF JOHN A. TALAMINI *v.* ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–18. Decided March 25, 1985

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring.

Appellant filed a two-count complaint against appellee seeking to recover damages under two Pennsylvania statutes.[1] The District Court granted a motion to dismiss Count II and appellant tried to appeal from that order under 28 U. S. C. § 1291. The Court of Appeals for the Third Circuit dismissed the appeal, presumably because the District Court's dismissal of only one count of the complaint was not a final order. Appellant has invoked our appellate jurisdiction under 28 U. S. C. § 1254, arguing that Pennsylvania courts would treat the District Court's dismissal as a final order and that the federal courts should also treat the dismissal as final under the collateral-order doctrine of *Cohen* v. *Beneficial Loan*, 337 U. S. 541 (1949). I find no merit to that argument and agree that the appeal should be dismissed; treating it as a petition for a writ of certiorari, the petition should be denied.

Appellee filed a nine-page motion to dismiss or affirm in which it correctly pointed out that a Court of Appeals does

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[1] Count I sought recovery under Pennsylvania's No-fault Motor Vehicle Insurance Act, Pa. Stat. Ann., Tit. 40, §§ 1009.101–.701 (Purdon Supp. 1984–1985) (repealed 1984). Count II sought recovery under Pennsylvania's Unfair Insurance Practices Act, Pa. Stat. Ann., Tit. 40, §§ 1171.1–.15 and Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann., Tit. 73, §§ 201–9.2 (Purdon Supp. 1984–1985). The complaint was originally filed in the state court and removed by appellee to the Federal District Court because of the parties' diverse citizenship.

not have jurisdiction over an appeal from a District Court order dismissing less than all of the claims alleged in a complaint unless the District Court has made the express determination that Rule 54(b) of the Federal Rules of Civil Procedure requires.[2] In the concluding section of its printed motion, appellee requests the Court to award it "double costs and attorneys fees incurred."[3] Because three Members of the Court have expressed the opinion that the request should be treated as a formal motion and that it should be granted "to the extent of awarding appellee $1,000 against Bruce Martin Ginsburg, Esq., appellant's counsel, pursuant to this Court's Rule 49.2," *post*, at 2, it is appropriate to explain briefly why the request should be denied.[4]

Appellee is entirely correct in pointing to the jurisdictional defect in this appeal. Moreover, it is a defect that competent counsel should readily recognize. Nevertheless, this

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[2] Federal Rule of Civil Procedure 54(b), entitled "JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES," provides:

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an expr[illegible] direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

[3] Motion to Dismiss or Affirm 9.

[4] The desire for similar action has been expressed in several cases in recent years. See, *e. g.*, *Potamkin Cadillac Corporation* v. *United States*, 462 U. S. 1164 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.); *Escofil* v. *Pennsylvania*, 462 U. S. 1117 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR JJ.); *In re Rush*, 462 U. S. 1117 (1983) (BURGER, C. J., REHNQUIST and O'CONNOR, JJ.); *Garcia* v. *United States*, 462 U. S. 1116 (1983); *Gullo* v. *McGill*, 462 U. S. 1101 (1983) (BURGER, C. J., and REHNQUIST and O'CONNOR, JJ.).

procedural error is one that has been frequently overlooked by a large number of experienced attorneys and judges in other cases.[5] It is not the kind of egregious error that may properly provide the basis for sanctions against an attorney. There are, moreover, two additional reasons why it would be unwise judicial administration to grant a motion of this kind.

Because of the large number of applications for review that are regularly filed in this Court, the public interest in the efficient administration of our docket requires that we minimize the time devoted to the disposition of applications that are plainly without merit.[6] Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task. It would require us either to adopt a procedure for assessing a fair compensatory damage award in particular cases, or to impose a somewhat arbitrary penalty whenever such a motion is granted. Unless there has been a gross abuse of the judicial process, or demonstrable and significant harm to a litigant, such action is unwarranted.[7]

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[5] See, *e. g.*, *Burney* v. *Pawtucket*, 728 F. 2d 547, 549 (CA1 1984) *(per curiam)*; *Wolf* v. *Banco Nacional de Mexico, S. A.*, 721 F. 2d 660, 661–662 (CA9 1983); *Liskey* v. *Oppenheimer & Co.*, 717 F. 2d 314, 321 (CA6 1983); *Sandoz* v. *Crain Brothers, Inc.*, 694 F. 2d 88, 89 (CA5 1982) *(per curiam)*; cf. 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2657, pp. 60–61 (1983) ("Unfortunately, it is not always easy to tell whether a case involves multiple claims (to which Rule 54(b) is applicable) or a single claim supported by multiple grounds (to which Rule 54(b) is not applicable). The line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure") (footnote omitted).

[6] Cf. *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 757, n. 4 (1980) ("The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law").

[7] The earliest version of This Court's Rule 49.2, enacted in 1803, provided:

"In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of *ten per centum per annum*,

Of greater importance than the practical problems associated with the processing of motions of this kind is the symbolic significance of the action that THE CHIEF JUSTICE proposes. Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation.[1] The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is,

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on the amount of the judgment." Rules and Orders of the Supreme Court of the United States, 1 Cranch xvi, xviii (1803) (Rule XVII) (emphasis in original).

Since that time the Rule has been revised and renumbered numerous times. See Rules of the Supreme Court of the United States, Revised and Corrected at December Term, 1858, 21 How. V, XIII (1858) (Rule 23.3); Rules of the Supreme Court Announced January 7, 1884, 108 U. S. 573, 586 (1884) (Rule 23.2); Revised Rules of the Supreme Court of the United States, 266 U. S. 653, 674 (1925) (Rule 28.2); Revised Rules of the Supreme Court of the United States, 275 U. S. 595, 617 (1928) (Rule 30.2); Revised Rules of the Supreme Court of the United States, 346 U. S. 951, 1006 (1954) (Rule 56.4). However, despite the 182-year existence of Rule 49.2 and its predecessors, it appears that they have rarely been invoked. See, *e. g.*, *Tatum* v. *Regents of the University of Nebraska*, 462 U. S. 1117 (1983); *Bohn* v. *Bohn*, 316 U. S. 646, 647 (1942) *(per curiam)* ("it appearing that the appeal was frivolous and taken merely for delay"); *Roe* v. *Kansas* 278 U. S. 191, 193 (1929); *Slaker* v. *O'Connor*, 278 U. S. 188, 190 (1929); *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232 (1923) ("We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay"); *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, 106 (1912) ("That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable"); cf. *Gibbs* v. *Diekma*, 131 U. S. App. clxxxvi, clxxxvii (1880) ("it is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just damages for their delay").

[1] See, *e. g.*, *Abney* v. *United States*, 431 U. S. 651 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.[9] This Court, above all, should uphold the principle of open access.

This is not, of course, to suggest that courts should tolerate gross abuses of the judicial process. If there is reason to believe that counsel have pursued unmeritorious litigation merely in order to generate fees for themselves, for example, judges should bring the matter to the attention of the appropriate disciplinary authorities.[10] Or if it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.[11] But the strong presumption is against

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[9] Justice Field eloquently penned this point on the occasion of the announcement of his retirement:

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.' It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. *But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government . . . .*" Letter of Resignation of Justice Stephen J. Field, 168 U. S. App. 716 (1897) (emphasis added).

[10] See Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 1.5 (1983) ("A lawyer's fee shall be reasonable").

[11] This Court's Rule 49.2 provides:

"When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

the imposition of sanctions for invoking the processes of the law.

If the Court has treated appellee's request as a motion under our Rule 49.2, the Court has correctly denied the motion.

This Court's Rule 50.7 states that "[i]n an appropriate instance, the Court may adjudge double costs." Cf. Model Rules of Professional Conduct and Code of Judicial Conduct, Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of his client"). The comment following this rule states:

"Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."

See also *id.*, at Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). The comment to that rule, in pertinent part, states:

"[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. . . . [An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."